SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 73-491

THOMAS LEE LIVINGSTON,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MELVIN L. WULF
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York

RICHARD A. AXELROD
802 Main Street
Bennington, Vermont 05201

Attorneys for Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

THOMAS LEE LIVINGSTON,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on April 16, 1973.

Opinions Below

The first opinion of the Court of Appeals, *en banc,* remanding petitioner's case to the district court is reported at 459 F.2d 797 and is set forth in the Appendix, *infra* at pp. 1a-8a.

The opinion of the district court following that remand, again adjudging petitioner guilty is unreported and is set forth in the Appendix, *infra,* at pp. 9a-18a. The opinion of the district court denying petitioner's post-trial motions for acquittal, arrest of judgment and a new trial are un-

reported and are set out in the Appendix, *infra,* at pp. 19a-21a. The judgment of the Court of Appeals affirming, without opinion, petitioner's conviction is unreported and is set forth in the Appendix, *infra,* at pp. 22a-23a. The order of the Court of Appeals denying petitioner a rehearing *en banc* is unreported and is set forth in the Appendix, *infra,* at p. 24a.

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on April 16, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

On June 13, 1973, an application for an extension of time in which to file a petition for certiorari, was received by the Clerk of the Court, but returned as untimely filed. The grounds for the anticipated untimely filing of the instant petition were set forth therein and the original of the application for the extension of time will be supplied to the Court upon request. The late filing of the instant petition is, it is respectfully submitted, not a jurisdictional defect. See *Schact* v. *United States,* 398 U.S. 58, 64-65 (1970); *Taglianetti* v. *United States,* 394 U.S. 316, n. 1 (1969).

Question Presented

1. Whether the Court below erred in holding petitioner guilty of willfully failing to report for induction.

Constitutional Provisions, Statutes and Regulations Involved

This case involves the Fifth Amendment to the Constitution of the United States; the Selective Service Acts of 1967 and 1970 (50 U.S.C. App. §451, *et seq.*) and 32 C.F.R. §1641.3 (1971).

Statement of the Case

Petitioner registered with Selective Service Local Board No. 173, York, Pennsylvania on March 13, 1962. He gave as his address 809 Center Street, Mt. Wolf, York County, Pennsylvania. As late as May 19, 1966, petitioner had informed his local board that this continued to remain his address (27a).

Between March 3, 1964 and May 10, 1966, petitioner was the subject of various administrative actions by his draft board, not here relevant, which resulted in the issuance to him of an induction order to which he did not respond. Prosecution was declined by the United States Attorney for the Middle District of Pennsylvania (28a, 29a).

Following these events, on January 17, 1967, petitioner was classified 2-A (occupational deferment) by reason of his employment with VISTA (26a).

On March 4, 1967, petitioner notified his local board that his address had changed to 3700 W. Grand Avenue, Chicago, Illinois, as a result of a transfer of his working assignment by VISTA (30a).

His term of service with VISTA having ended, petitioner was reclassified 1-A (available for service) on March 14, 1968 (26a). A Notice of Classification to that effect (SSS Form 110) was mailed to petitioner on March 22, 1968 to the "3700 W. Grand Avenue Chicago" address but this notice (31a) was returned to the local board on March 25, 1968 stamped "Addressee unknown", and bore the handwritten legend "address not here", "address not known" (31a). On April 2, 1968, the Notice of Classification of March 22, 1968 was remailed to petitioner's Mt. Wolf, Pennsylvania, address. The envelope and its contents were not returned (31a).

Thereafter, having received no notice of appeal from petitioner or request for a personal appearance,[1] the local board, on April 23, 1968, mailed to petitioner an Order to Report for Induction (SSS Form 252), on May 16, 1968 (26a, 32a). For some unexplained reason, however, the induction order was mailed to the "3700 W. Grand Avenue" address in Chicago (32a) despite the local board's prior knowledge that petitioner no longer resided at that address.

Petitioner testified at trial, without challenge, that he never received the induction order (48a).

On July 31, 1968, petitioner's local board received a letter from him containing the innocuous request that he be sent a new set of draft cards since he had lost his (33a).

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[1] See 32 C.F.R. Parts 1624 and 1625.

Petitioner also informed the board of his new address: "4431 n. Clifton Ave., Chicago, Illinois."[2]

In response to petitioner's letter, the local board's executive secretary prepared a letter to petitioner, dated July 31, 1968, which illogically informed him only of his failure to report for induction in 1966 for which prosecution had long before been declined—a fact which petitioner already knew (34a). No mention of the April, 1968 order, of which petitioner was unknowingly in default, was made. More importantly, while the letterhead address of the board's July 31st letter was typed out to "4431 Clifton Avenue," the envelope in which the letter, and an accompanying "Current Information Questionnaire," were sent to petitioner, was *misaddressed by the secretary* to "4441" North Clifton Avenue (36a). This letter was thus returned, "Addressee unknown".

On June 6, 1968, petitioner was reported for prosecution to the United States Attorney for the Middle District of Pennsylvania for violating the April, 1968 induction order (37a-38a).

Admittedly, no attempt was ever made by the Selective Service System to remail the April 23, 1968 induction order to either petitioner's Mt. Wolf, Pennsylvania address or the residence at 4431 North Clifton Avenue, at which petitioner could have received it. Nor was any effort made to prepare a letter similar to the one of July 31, 1968 properly informing him of the outstanding April, 1968

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[2] A typographical error in petitioner's letter indicates that the "3" in "4431" was typed over an erroneously typed "4", making it difficult to determine without close scrutiny whether the North Clifton Avenue address should be "4431" or "4441".

induction order or to mail such a letter to petitioner's correct address.[3]

Proceedings Below

Petitioner was indicted on September 16, 1969 for his failure to report for induction on May 16, 1968. He was convicted of that charge on September 22, 1970 on a general finding of guilty after a non-jury trial. No opinion, findings of fact or conclusions of law were filed by the district judge.

An appeal to Third Circuit was taken and following argument to a panel and then reargument *en banc,* the judgment of conviction was vacated and the case remanded to allow the district judge to make findings of fact and state conclusions of law. See *United States* v. *Livingston,* 459 F.2d 797 (3rd Cir. 1972) (1a).

On July 24, 1972, the trial court filed an opinion (9a), again finding petitioner guilty.

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[3] The trial court justified its finding that petitioner had received the April 28, 1968 induction order by compounding an obvious administrative error made by the board's secretary on page 2 of the Delinquent Registrant Report (SSS Form 301) (38a). The clerk had there typed, "April 2, 1968—Induction Notice, SSS Form 252 was remailed to original address: 809 Center Street, Mt. Wolf Pa. 17347".

Obviously however, it was not the induction order that had been remailed on April 2, 1968 to petitioner but rather it was the Notice of Classification which had been previously returned from the 3700 Grand Avenue address. It is logically impossible that an induction order not prepared until April 28, 1968 could be "remailed" on April 2, 1968.

The district court, when directed to this obvious impossibility, merely characterized it as "at best . . . an error which goes to credibility" (20a). No other evidence proving that the April 28, 1968 induction order had been mailed to Mt. Wolf, Pennsylvania, was introduced at trial.

With all due respect, petitioner submits that the trial court committed plain error in this crucial regard under F.R. Cr. P. 52(b).

Petitioner's motions to set aside the verdict were also denied (19a).

At the trial, the government's chief witness was the clerk of petitioner's local board. In response to defense counsel's question as to why, in the letter of July 31, 1968 (34a), she had not informed petitioner that he was in default of the May 16, 1968, induction date she responded,

> A. I can't answer that.

Further questioning followed:

> Q. Didn't you have a suspicion maybe he didn't get the mail since the envelope [which had contained the induction order] had come back "address unknown?" A. I can't answer that.
>
> Q. After a man fails to report for induction do you ever send him additional orders to give him another chance to submit? A. We give him another chance *sometimes*, yes (emphasis added) (40a).
>
> * * * * *
>
> Q. Is there anything indicating that he was aware he was supposed to report in 1968? A. No. . . . (41a).
>
> * * * * *
>
> Q. Now, Mrs. Grove [the local board clerk] what kinds of considerations go into the decision as to whether or not you send out an additional order to report for induction after a man has failed to report? You say you do it sometimes? A. Well, we make every effort to contact his previous employer or his parents, and sometimes they give us a lead and we give them another chance (43a).
>
> * * * * *

> **Q. After he sent in the new current information questionnaire, again giving his address, did you make any effort to give him another chance by sending him another notice of induction?**
>
> • • • • •
>
> **A. . . . no (44a).**

In contrast, petitioner took the stand and testified to his whereabouts in April and May of 1968:

> Q. Mr. Livingston, in 1968, did you ever receive a notice to report for induction? A. No, I didn't.
>
> Q. Were you ever made aware you were to report for induction by anyone? A. No.
>
> Q. You submitted an address in Chicago to your local board in 1967, is that correct? A. Yes sir.
>
> Q. Were you there at all times? A. Most of the time, yes. I was living there then.
>
> Q. Did you customarily receive your mail there? A. Yes.
>
> • • • • •
>
> Q. Mr. Livingston, where did you say you were living in Chicago in 1968? A. In 1968 I was uptown.
>
> Q. Uptown? A. Uptown.
>
> Q. Do you recall the address? A. On Clifton Avenue. It was the 4400 block. I don't know the exact number (48a-49a).

The trial court's opinions denying petitioner acquittal rested primarily on the premise that,

> To allow the defendant to fail to report an address change and then rely upon the failure as an excuse to avoid induction would be to reward the doubly delinquent (17a).

The Third Circuit affirmed in an order without opinion (22a).

REASONS FOR GRANTING THE WRIT

I.

The decision below is in conflict with the decision of this Court in *Bartchy* v. *United States*, 319 U.S. 484 (1942).

The government in the instant case has, at best, indicted petitioner and obtained his conviction for the wrong offense.

32 C.F.R. §1641.3, at all times relevant hereto, provided that,

> It shall be the duty of each registrant to keep his local board advised of the address where mail will reach him. The mailing of any order, notice or blank form by the local board shall constitute notice to him of the contents of the communication, *whether he actually receives it or not.* (Emphasis added.)

While the italicized portion of the regulation has been held to be of doubtful constitutionality, see *United States* v. *Bowen*, 414 F.2d 1268 (3rd Cir. 1969); *United States* v. *Simmons*, 476 F.2d 33 (9th Cir. 1973); *United States* v. *Smith*, 308 F. Supp. 1262 (S.D.N.Y. 1969), this Court, in *Bartchy* v. *United States*, 319 U.S. 484 (1942), held that the duty imposed upon the registrant to supply his local board with an address where the mail will reach him is satisfied,

> . . . when the registrant in good faith, provides a chain of forwarding addresses by which mail sent to the address which if furnished the board, may be by

> the registrant reasonably expected to come into his hands in time for compliance. 319 U.S. at 489.[4]

The uncontradicted evidence adduced at the trial below shows that the only document ever presumably received by petitioner during the time period relevant to the instant prosecution was the March 22, 1968 Notice of Classification (SSS Form 110) which had been remailed to petitioner's Mt. Wolf, Pennsylvania address, following its return from the "3700 W. Grand Avenue" Chicago address. This Notice of Classification, remailed April 2, 1968 (31a) was not and could not have been an induction order.

The induction order of April 23, 1968 was mailed to an address in Chicago at which the board admittedly knew petitioner no longer resided.

The letter of July 31, 1968 not only failed to inform petitioner of his delinquency in reference to the April, 1968 induction order but, additionally, it was misaddressed by the local board so that it never reached the new Chicago address which pettiioner had, in good faith, informed the board of (33a).

Finally, no attempt was ever made to inform petitioner of his unknowing default of the April 28, 1968 induction order at his proper North Clifton Avenue, Chicago address or his Mt. Wolf, Pennsylvania address (44a).

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[4] See also *Ward* v. *United States*, 344 U.S. 924 (1953) rev'g 195 F.2d 441 (9th Cir. 1952); *United States* v. *Ebey*, 424 F.2d 376 (10th Cir. 1970). Compare, *Venus* v. *United States*, 368 U.S. 345 (1961), aff'g 287 F.2d 304 (9th Cir. 1960).

In the instant case petitioner was indicted for noncompliance with an induction order which the uncontradicted evidence showed he never received. The district court's disavowal (17a) of any reliance on the seemingly irrebutable presumption created by the italicized portion of the regulation, *supra*, means little if the court merely substituted its own illogical presumption of receipt. See, *United States* v. *Lake*, —— F.2d ——, No. 72-1942 (9th Cir. May 29, 1973).

Admittedly, while petitioner's nonreceipt of an induction order may have been the result of his non-compliance with the duty imposed upon him by 32 C.F.R. §1641.3 to keep his board advised of an address where mail might reach him, proof of this fact, which the government sought to adduce, literally negates the crime charged in the indictment, which is a totally separate offense. *United States* v. *Williams*, 421 F.2d 600 (10th Cir. 1970); cf. *Bartchy* v. *United States, supra* at 488.

In order to obtain such a conviction the government must prove what admittedly it could not—that the petitioner had knowledge of his duty to report and that he intended to evade that duty. See, *United States* v. *Figurell*, 462 F.2d 1080 (3rd Cir. 1972); *United States* v. *Raab*, 394 F.2d 230 (3rd Cir. 1968). Cf. *Lambert* v. *California*, 355 U.S. 225, 229 (1957).

The trial court's failure to perceive this distinction thus led to its erroneous observation that, "To allow the defendant to fail to report an address change, [and] then rely on the failure as an excuse to avoid induction would be to reward the doubly delinquent" (17a). The answer of course is not to reward the doubly delinquent but to indict them for the proper offense and not to transmute evidence showing a failure to supply an address (thereby preventing receipt of an induction order) into a conviction for a willful failure to report for induction.[5]

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[5] Compare, e.g., *Bartchy*, *Ward*, and *Venus*, all *supra*, in which the proper offense was charged. It is to be noted in *Bartchy, supra*, that the petitioner there was acquitted, and properly so, of the induction count, since he had not received the order in question, although the reason for the failure to receive the order was charged as the basis for the second, or "address" count. See also e.g., *United States* v. *Booth*, 454 F.2d 318 (6th Cir. 1972), in which, despite two indictments spanning five counts, no conviction for a willful failure to report for induction could be had.

CONCLUSION

For all of the foregoing reasons the petition for certiorari should be granted and the conviction reversed.[6]

Respectfully submitted,

MELVIN L. WULF
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York

RICHARD A. AXELROD
802 Main Street
Bennington, Vermont 05201

Attorneys for Petitioner[*]

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[6] Should certiorari be granted, petitioner also preserves the question of whether or not his induction order was issued in violation of this court's holding in *Gutknecht* v. *United States*, 396 U.S. 205 (1970). In a letter to the Pennsylvania State Director of Selective Service, dated January 4, 1967, the United States Attorney for the Middle District of Pennsylvania, after having apparently agreed to decline prosecution of petitioner, suggested to the State Director that following the expiration of petitioner's year in VISTA "he then immediately be ordered for induction. . . ." (29a).

Petitioner submits that such a suggestion rebuts the presumption that petitioner's induction was not accelerated, and the courts below erred in not requiring the government to sustain its burden of proving, beyond a reasonable doubt, that it was not. See, *United States* v. *Dudley*, 451 F.2d 1300 (6th Cir., 1971); *Bradley* v. *Laird*, 449 F.2d 898 (10th Cir. 1971). See also *Davis* v. *United States*, No. 72-1454, Oct. Term 1972, *cert. pending*, in which this issue is also presented in a similar context.

[*] Attorneys for petitioner gratefully acknowledge the assistance of Mr. Edwin J. Oppenheimer, law clerk, New York Civil Liberties Union.

APPENDIX

Opinion of the Court of Appeals en Banc, Remanding Petitioner's Case to the District Court

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 71-1022

UNITED STATES OF AMERICA

—v.—

THOMAS LEE LIVINGSTON,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued October 5, 1971

Before McLAUGHLIN, GANEY and ADAMS,
Circuit Judges

Reargued en banc January 12, 1972

Before SEITZ, *Chief Judge*, McLAUGHLIN, GANEY,*
VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN,
ROSEN, HUNTER, *Circuit Judges*

OPINION OF THE COURT

(Filed May 2, 1972)

SEITZ, *Chief Judge.*

Defendant appeals a judgment of sentence imposed for failure to report for induction into the United States

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* Judge Ganey participated in the hearing and consideration of this appeal but died before final decision.

Army. 50 App. U. S. C. §462. Several contentions are raised as grounds for setting aside defendant's conviction. However, in view of our disposition of this appeal we need consider only the issue of whether it was permissible for the district judge to condition his grant of defendant's request for a non-jury trial on defendant's waiver of findings of fact and conclusions of law.

Prior to trial defendant requested that his case be tried to the court without a jury. Noting that "by waiving a jury, [defendant was] asking the judge to find the facts as well as the law," the court declined to grant the request "unless [the defendant] . . . agree[d] that the Court [would] not have to find findings of fact and conclusions of law." Defendant acceded to this condition and the case was heard without a jury. At the close of all the evidence the court merely entered its order finding defendant "guilty." This appeal followed.

We note at the outset that the district court conditioned its grant of defendant's request for a non-jury trial on a waiver by him of both findings of fact *and* conclusions of law. The applicable rule, however, requires only that the court "make a general finding and . . . in addition on request find the facts specially." Rule 23(c), F. R. Crim. P. Detailed legal conclusions are, of course, appropriate in non-jury criminal proceedings, particularly when the facts of a case suggest several legal principles which the trial judge might have invoked. Cf. Canon 19, The Canons of Judicial Ethics of the American Bar Association. See also United States v. Rivera, 444 F.2d 136, 138 & n.5 (2d Cir. 1971). We do not here decide, however, whether the facts of this case mandated the court to formulate conclusions of law. Rather, we conclude only that the district court erred when it conditioned defendant's request for a non-

jury trial on a waiver by him of his right to request that the court find the facts specially.

Findings of fact in non-jury criminal cases primarily aid the defendant in preserving questions for appeal and aid the appellate court in delineating the factual bases on which the trial court's decision rested. See 8 Moore's Federal Practice (Cipes, 2d ed.), Para. 23.05. Indeed, it has been suggested that findings under Rule 23(c) are a prerequisite to preserving for appeal issues concerning the significance or existence of a particular fact. See Wilson v. United States, 250 F.2d 312, 325 (9th Cir. 1957); Cesario v. United States, 200 F.2d 232, 233 (1st Cir. 1950). Findings of fact are essential to proper appellate review of a conviction resulting from a non-jury trial. This was an important consideration when the present text of Rule 23(c) was promulgated, altering pre-existing law and *requiring* the trial judge to make special findings, if requested. See Barron & Holtzoff, Federal Prac. & Proc., §2124 (Rules ed.). Compare United States v. Weber, 437 F.2d 1218, 1221 (7th Cir. 1971) with Lofland v. United States, 357 F.2d 472, 477 (9th Cir. 1966). Rule 23(c) entitled the defendant to request and receive special findings. Howard v. United States, 423 F.2d 1102, 1104 (9th Cir. 1970).

Of course, defendant here at no time requested special findings. However, such a request indeed would have been futile in view of the pre-trial waiver imposed upon defendant by the court. Cf. id. at 1104. The defendant was therefore under no obligation to request special findings. The district court cannot, by procuring such a pre-trial waiver, avoid its responsibility to make findings of fact when presented with a timely request. As the court said in Howard, supra: "The defendant's right to such findings

is not trivial, and his exercise of that right is not to be impaired by the exertion of pressure from the court."

It remains to be considered what relief to accord the defendant. We have reviewed the record and find that credibility issues are not of such pervasiveness as to require a new trial. We therefore think that the district judge who tried this case is in a position fairly to make the findings required by Rule 23(c) before imposing sentence.

The judgment of sentence based on the guilty verdict is vacated and the case remanded to the district court for further proceedings in accordance with this opinion.

Judge McLaughlin concurs in the result.

ADAMS, *Dissenting.*

I respectfully dissent from the holding of the majority opinion because I do not believe that what the district court did with regard to waiver of the jury trial constitutes plain error.

At the very beginning of the trial,[1] the defendant moved to waive the jury. The district judge informed the defendant of the advantages of a jury trial and of defendant's right to demand a jury. The judge explained that by waiving a jury trial, the defendant would be relinquishing the right to a unanimous verdict and would be "asking the judge to find the facts as well as the law." The following colloquy then ensued:

"The Court: * * * Do I understand that is what you want to do?

The Defendant: That is true, sir.

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[1] This case was tried in June, 1970. Thus, the findings mandated by the majority's decision will have to be made by the district court from a written record almost two years old.

The Court: Very well. The Court doesn't need to accept such a responsibility[2] and the Court will not unless you also agree that the Court will not have to find findings of fact and conclusions of law.
[Defendant's Attorney]: We will agree to that.
The Court: You are satisfied to do that?
[Defendant's Attorney]: Yes.
The Court: Are you satisfied, Mr. Livingston?
The Defendant: I am.
The Court: That is your own wish?
The Defendant: That is my own wish."

Rule 23(c) of the Federal Rules of Criminal Procedure provides: "In a case tried without a jury, the court shall make a general finding and shall in addition *on request* find the facts specially. * * *" (Emphasis added.) Accordingly, absent a request, defendant would not have been entitled to such findings. No such request was ever made, and in addition, defendant never objected in any way to the condition imposed by the court.

Defendant seeks to circumvent the fact that he made no objection by arguing that to have objected would have subjected him to the risk of incurring the anger of the trial judge. But nothing in the record indicates that the trial judge was so emotional with regard to the issue of special findings that he would have reacted in a manner adverse to defendant if the defendant had specifically requested that findings he made, or objected to the statement that the judge was not going to make findings. Rather, the record clearly demonstrates that defendant made an advertent decision that it would be to his advantage to proceed with a trial before the court, even without special findings of fact. Later, after he was adjudged guilty of the

[2] Apparently the district court was relying on Singer v. United States, 380 U.S. 24 (1965).

offense charged, the defendant still appeared satisfied with his election, for he did not raise the issue of the conditional waiver of a jury trial in his post-trial motions.

The venerable but universal rule requiring parties to call objectionable rulings to the attention of the trial judge before the matters may be raised on appeal is not based upon an anachronistic reliance on ancient and obsolete formalisms. Instead, the rule serves a real and vital purpose in that it allows trial judges to avoid or correct potential errors before they occur or while they can still be readily remedied. If the defendant objected to the alternative posed by the district court's condition, the district court might well have allowed the waiver of the jury without the imposition of any conditions. Had the district court declined to modify its position, then the question preserved for appeal would be whether the district court abused its discretion by conditioning a trial before the court on the waiver of findings. But where an objection is not made, we may reverse a district court only where plain error has occurred. *See* Fed. R. Crim. P. 52(b). As things stand now, the question before us is whether plain error is committed when a defendant, upon advice of retained counsel, waives special findings in order to obtain a non-jury trial.

In the context of this case, it does not appear that plain error has been committed. Defendant made an intelligent and knowing decision to waive a jury trial and to accept a general verdict from the district court. Obviously defendant and his counsel felt, at the beginning of the trial, that this course of action was more advantageous than proceeding before a jury. Even after the guilty verdict was announced, defendant was not dissatisfied with his election.

Only on appeal, and as an apparent afterthought, has the issue been raised. To grant relief in these circumstances plays "fast and loose" with the appellate process, and sets a precedent to which I cannot subscribe. Had defendant been uncounselled or incompetently represented, or had the colloquy with the district judge revealed that the judge would be arbitrary, abrupt, peremptory, unyielding, or uncompromising, it might well be that the judge had committed plain error. But such facts are not disclosed here, and the record does not admit to any such inferences.

It is not without significance that the rule on findings in criminal proceedings is substantially different from the rule on finding in civil proceedings. The framers of the rule pertaining to civil proceedings have made it mandatory for trial judges sitting without a jury to make detailed findings of fact and conclusions of law. *See* Rule 52, Fed. R. Civ. P. The draftsmen of the criminal rule, on the other hand, have not made such a procedure obligatory, but have provided that in criminal matters findings be made only upon request.

It is common knowledge among trial judges that the task of making detailed findings in either civil or criminal cases is often tedious, and one that frequently consumes as much time as might otherwise be saved in the course of dispensing with a jury trial. Requiring such findings may well have a negative effect on the willingness of trial judges to conduct non-jury criminal trials.

Our function is to correct error which affects substantial rights of litigants. It is beyond our province to sit back like school teachers and grade every ruling of a lower court —produced often with great dispatch and during the strain and tension of a trial—as if it were a test paper. Although we are a superior court in the judicial schema, we do not

have license to substitute our judgment for that of the lower courts absent prejudicial error. To reverse a ruling made in good faith with which counselled parties were satisfied, in the absence of plain error, displays an insensitivity to the realities of litigation in the judicial system.

As noted above, the direct impact of today's holding will be to discourage trial judges from granting non-jury trials in criminal cases. An equally disturbing, although less direct, impact might be to encourage lawyers to refrain from voicing objection to questionable decisions in the hope of luring district courts into reversible error. Litigation is an attempt to arrive at truth, not a game of wits in which the participants are attorneys and judges and the prize is reversal.

For all these reasons, I respectfully dissent from the majority's holding in this case.

Opinion of the District Court Adjudging Petitioner Guilty

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Criminal No. 14685

UNITED STATES OF AMERICA

v.

THOMAS LEE LIVINGSTON

THOMAS LEE LIVINGSTON

The defendant, Thomas Lee Livingston, was indicted by a grand jury in September 1969 for the willful violation of 50 App. U.S.C. § 462. The gravamen of the offense is the failure to report for induction into the armed forces. The defendant waived trial by jury and this court found him guilty as charged. The Court of Appeals for the Third Circuit remanded the case to this court for findings of fact pursuant to Rule 23(c) of the Federal Rules of Criminal Procedure.[1]

I. FINDINGS OF FACT[2]

1. Thomas Lee Livingston was born February 6, 1944 in the City of York, York County, Pennsylvania.

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[1] Rule 23(c) of the Fed. R. Crim. P. provides: "In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein."

[2] Defendant's proposed findings of fact do not include any reference to events prior to May 1, 1966.

2. Defendant is a registrant of Local Selective Service Board No. 173, York, Pennsylvania.

3. Based upon a completed Classification Questionnaire (SSS Form 100), the defendant was classified 2-S. The classification occurred March 12, 1964 based upon defendant's status as a full-time student at Pennsylvania State University.

4. The 2-S classification is a deferment which at that time was ordinarily made for full-time college students.

5. At the time of his March 12, 1964 classification defendant gave his address as 809 Center Street, Mt. Wolf, Pennsylvania.

6. Defendant indicated in his Form 100 response that in addition to being a student he was a member of Arm R.O.T.C. and not a conscientious objector.

7. Defendant received and completed a Request for Current Information prior to Pre-Induction Examination or Induction (Form 55 P-2617). The form was returned sometime in November 1965.

8. The Form SS P-2617 indicated no change of address and stated defendant was employed as a lab technicia (since January 1965).

9. Defendant was classified 1-A on December 7, 1965 and a Notice of Classification (SS Form 110) was sent to him.

10. Defendant did not appeal the reclassification.

11. Defendant was ordered to report for a physical examination prior to induction. On April 6, 1966 he was found to be physically suitable for service.

12. On April 19, 1966 defendant was ordered to report for induction on May 10, 1966.

13. On May 2, 1966 Local Board 173 received a request from the defendant for an occupational deferment as a member of VISTA.

14. Local Board 173 sent a request to the defendant for verification of his status as a VISTA volunteer. The request was addressed to 809 Center Street, Mt. Wolf, Pennsylvania.

15. On May 9, 1966 Board 173 received confirmation from VISTA headquarters regarding defendant.

16. On May 10, 1966 defendant failed to report for induction.

17. On July 1, 1966 Local Board 173 declined to reclassify the defendant and he was so notified.

18. In September 1966 the defendant sought a Form SSS-150 for status as a conscientious objector. The request was not acted upon.

19. On January 17, 1967 defendant was reclassified 2-A as a result of his VISTA work. The reclassification was a result of a recommendation by the State Selective Service Headquarters.

20. On March 4, 1967 defendant notified the local board that he had changed his address to 3700 W. Grand Avenue, Chicago, Illinois.

21. Defendant completed VISTA service on June 6, 1967. Local Board 173 learned of the completion when defendant returned a Current Information Questionnaire (SSS Form 127) on July 31, 1968.

22. On March 19, 1968 defendant was reclassified 1-A. A new classification card (SSS Form 110) was mailed to 3700 W. Grand Street, in Chicago, Illinois, and returned marked "Addressee Unknown." The notice was mailed to defendant's Mt. Wolf address and not returned. No appeal was taken.

23. On April 23, 1968 defendant was ordered to report for induction on May 16, 1968.

24. On May 16, 1968 the defendant failed to report for induction.[3]

II. Conclusions of Law

This court found the defendant guilty after his non-jury trial and finds no reason to alter that finding.

The defendant cites *United States* v. *Turner*, 421 F.2d 1251 (3d Cir. 1970) as controlling on the matter of conscientious objector (C.O.) status. On first reading, *Turner* appears to be a persuasive case directly on point. However, a close study reveals some crucial differences between that case and the instant one.

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[3] Additional conclusions, surrounding the preliminary findings of fact, are incorporated in the text.

In *Turner* the defendant promptly registered with his local board on attaining age 18. In July of 1965 he sought a C.O. Form (SSS No. 150). It was not until November of that year that defendant Turner was ordered to report for a physical. The day before he was due for the examination he appeared at the local board and explained that he was a conscientious objector and would not submit to the examination. He explained that his parents had forbidden him to previously pursue the C.O. status, but that he wished to do so anyway. The board clerk asked for a written explanation which he prepared, stating himself to be an Islam. Defendant failed to report for the physical thereby subjecting himself to immediate induction.

Contrasted with *Turner,* the defendant in the instant case was a delinquent registrant for failing to report for induction in May 1966, when he *first* sought C.O. status. As a host of cases[4] note, including the court in *Turner,* a request for C.O. status *after* an induction notice does not give rise to a right to reopen classification. The instant defendant makes a great deal out of the board's failure to act on his request for C.O. status *after* his failure to appear for induction. However, the cases cited in Note 4 herein clearly hold that no right exists for such action.

Additionally, the defendant's request was not acted upon since a local board loses all jurisdiction when a registrant becomes delinquent (Transcript, at 109-110) and the State Selective Service office obtains control. It was that office in fact which ultimately recommended to the local board to classify the defendant 2-A as a result of his VISTA

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[4] *United States* v. *Reese,* 432 F.2d 57 (2d Cir. 1970); *United States* v. *Smith,* 423 F.2d 559 (9th Cir. 1970); *United States* v. *Lowell,* 437 F.2d 906 (9th Cir. 1970).

work. The defendant gladly accepted the 2-A classification[5] and pursued his request for C.O. status no further.

It is more than a mere technicality to determine what significance to place on defendant's failure to report in 1966. As noted, *supra,* his request for C.O. status *followed* the 1966 failure to report and *preceded* the 1968 failure to report.

Although the 1968 incident is at issue here, it is significant to this court that the request for C.O. status preceded the defendant's successful reopening of classification. That reopening resulted in a change from 1-A (imminent draft material) to 2-A (occupational deferment).

At the expiration of his 2-A status, defendant failed to inform his local board of his occupation change. It was not until *a year later,* upon the board's inquiry, that the defendant revealed his job change. Based on his non-deferable employment, defendant's classification went from 2-A back to 1-A, a change he made no attempt to appeal.[6] Based on

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[5] It should be noted that the request for an occupational deferment came on May 2, 1966, almost three weeks *after* his April 19, 1966 notice for induction. Therefore, defendant was not exercising a right in seeking reclassification, but enjoying a privilege extended by the State Selective Service Office. It should be further noted that 32 C.F.R. § 1625.1(b) requires the registrant to notify the board of a desire to appeal his classification. Defendant clearly accepted the 2-A and said nothing about appealing for a C.O. status.

It is true that once a registrant seeks a C.O. form, the board has the duty to act. It is equally important, however, that a *registrant* must seek an appeal from a classification. In the instant case (even assuming the board to have had control over the delinquent defendant), the defendant had two classification "requests" before the board. Once he was assigned one of those classifications, then a desire to have the other would necessitate an appeal. Instead, the defendant accepted one and impliedly discarded the other. All the above assumes the board to have had control of the C.O. matter, a conclusion this court does not share. Therefore, regardless of the jurisdiction question, defendant's argument is not viable.

[6] Defendant's suggested conclusion of law (No. 35) merely asks the court to find the failure to appeal "justified in light of all the evidence."

his new 1-A classification he was then ordered to report. The transcript makes quite clear that the local board had jurisdiction over the defendant on two, interrupted occasions. Their jurisdiction was broken by the 1966 failure to report, followed by a renewal of the jurisdiction when the State Board recommended the 2-A classification. Between events, the defendant sought C.O. status from a board which had lost jurisdiction over him by his willful failure to submit to induction.

Additionally, it appears quite clear to this court that the request for an SSS Form 150 was part of the defendant's *first* attempt to avoid induction. That attempt was abandoned when he won a deferment (See n. 4).

The court therefore rejects the defendant's argument that due process requirements were violated by the board's failure to forward the SSS Form 150, requested *prior* to receiving and accepting a favorable 2-A classification.

Defendant also argues that he never was notified of h[illegible] order to report for induction and therefore did not willfully refuse to submit.

As the defendant's pre-trial briefs conceded, the question of whether the defendant received notice of the 1968 induction date is one for the trier of fact. No overriding legal questions present themselves in such a fashion as to be controlling.

This court naturally takes judicial notice of Selective Service regulations, among them the requirement that the registrant inform the local board of his mailing address. An examination of the entire transcript reveals a highly cavalier attitude by the defendant, both as to change of address notification and changed job status.

Defendant Livingston was notified by mail that he had been reclassified 2-A. That notice was sent to defendant's Mt. Wolf, Pennsylvania address (his parents' home).

On April 6, 1967, subsequent to reclassification, the local board received a change of address notice from defendant (dated March 4). The letter also referred to his VISTA job and that his occupation remained the same (Transcript, at 54). This court, as the fact finder, believes it can fairly and reasonably interpret the March 4 letter as revealing the defendant's knowledge of reclassification.

The defendant makes a great deal of the fact that on May 16, 1966, defendant's mother informed the board that her son was unavailable at the Mt. Wolf address. She apparently informed the board that the defendant could be reached through VISTA headquarters. This contention is irrelevant since the defendant himself informed the board of his Chicago address, then moved away without notifying the board. To argue that the May 16, 1966 letter is evidence that the board should have avoided the Mt. Wolf address is absurd.

On May 17, 1966 the board received a letter from the defendant regarding VISTA. The letter was addressed from 809 Center Street, in Mt. Wolf. In any event, by April 1968 the defendant had been fully two years out of the employ of VISTA (without informing the board until one year after leaving VISTA). The board had already learned that defendant was no longer at the Chicago address (no new change of address notice was sent by defendant) (Transcript, at 55). The local board was therefore faced with the following facts:

1. A 1-A registrant due for induction.
2. A mailing address which no longer applied to the registrant (3700 W. Grand Avenue, Chicago, Ill.)
3. A registrant who had failed to supply a new address.

4. A home address in Mt. Wolf, Pennsylvania, from which the defendant had written on numerous occasions.

5. A Mt. Wolf address to which the board had sent notice of the 2-A classification (and inferentially been responded to) and to which it had sent a 1-A classification which was not returned (as it had been from the Chicago address).

The local board simply sent the induction notice to the Mt. Wolf address as the only remaining alternative. To allow the defendant to fail to report an address change, then rely on the failure as an excuse to avoid induction would be to reward the doubly delinquent.

It is true that in *United States* v. *Bowen,* 414 F.2d 1261 (3d Cir. 1970) the court rules 32 C.F.R. § 1621.11 unconstitutional. That regulation created a conclusive presumption that anything mailed to a registrant's last address was received and understood by him. This court does not rely on any such conclusion. Instead, as the finder of fact, this court merely need determine from the facts if the defendant did receive the notice.

This court finds that the defendant did in fact receive the induction notice and that the court is convinced beyond a reasonable doubt of such receipt.

The defendant has also attacked the composition of the board and the authorization procedure for the signing of induction notices.

Evidence at trial indicated that at least one board member may have lived outside the community where the board was located. However, all board members were resident of the County in which the board was located. As 32 C.F.R.

§ 1604.52(c) notes, only county residence is mandatory. Such mandatory residence was satisfied in the instant case.

Defendant argues that *United States* v. *Bryan*, 2 SSLR 3308 (W.D. Pa. 1969) is persuasive regarding authority to sign inductions orders. *Bryan* is off-point on at least two crucial issues. The defendant in that case was two days short of the maximum age for induction. His local board failed to meet at all, contrary to 32 C.F.R. § 1642.13, regarding the defendant's delinquency.

In the instant case the record is replete with evidence regarding meetings of the board which concerned the defendant and others.

In *Bryan* the local secretary had issued a delinquency report without any authority whatsoever. In the instant case, however, the secretary (or clerk) was authorized to sign documents. That authorization was granted pursuant to 32 C.F.R. § 1604.59. The board made such authorization on October 4, 1948 and again on April 16, 1968. Additionally, in *Bryan* the secretary issued the delinquency ruling; whereas, in the instant case, the secretary merely signed the order for induction. The court therefore rejects defendant's arguments regarding the composition of the board and the authority of the secretary to sign the orders.

For the foregoing reasons, this court finds the defendant, Thomas Lee Livingston, guilty as charged beyond a reasonable doubt of violating 50 App. U.S.C. § 462.

R. Dixon Herman
United States District Judge
Middle District of Pennsylvania

Dated: July 19th, 1972.

Opinion of the District Court Denying Petitioner's Post-Trial Motions

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Criminal No. 14685

UNITED STATES OF AMERICA

—v.—

THOMAS LEE LIVINGSTON

MEMORANDUM AND ORDER

Before the court is defendant's motion to vacate the order of August 3, 1972 denying defendant's post trial motions on the ground that said motions were not timely filed within 7 days after the verdict or finding of guilty, as required by Rules 33 and 34 of the Federal Rules of Criminal Procedure.

Defendant contends that the 7-day period proscribed by Rules 33 and 34 is enlarged to 10 days by Rule 45(e) of the Federal Rules of Criminal Procedure.[1] This contention is without merit. Rules 33 and 34 provide that the motions for new trial and in arrest of judgment be made within 7 days "after verdict or finding of guilty," not "after the service of a notice or other paper upon him." *Cf. Crow* v. *United States*, 203 F.2d 670 (9th Cir. 1953).

[1] Rule 45(e) provides: "Whenever a party has the right or is required to do an act within a prescribed period after the service of a notice or other paper upon him and the notice or other paper is served upon him by mail, 3 days shall be added to the prescribed period."

As the verdict of guilty was rendered on July 19, 1972, it is clear that the 7-day period began the following day and expired on July 26, 1972, two days before defendant filed his post trial motions.

Assuming *arguendo* that defendant's motion to vacate is valid, we turn to the merits of his motions for a new trial and in arrest of judgment. Defendant has based the merits on one issue, what he terms a gross factual error by the court. The crucial factual determination is whether the defendant ever received his 1968 induction notice. This court found that he had received the notice and thereafter failed to report for induction. Without belaboring issues covered in the court's July 19, 1972 memorandum, it suffices to say that the draft board did not know defendant's whereabouts when it mailed the induction notice. The board secretary testified that the April 23, 1968 notice was mailed to a Chicago address, then returned as "Address unknown". She testified that it was then mailed to defendant's original home address in Mt. Wolf, Pennsylvania.

In his post trial motion defendant points to an apparent error in his Selective Service record signed by the board secretary, Mrs. Grove. In the record is a reference to an April 2, 1968 induction notice being mailed to defendant in Mt. Wolf. This error, defendant contends, is the source for the mistaken notion that the April 23rd notice was ever forwarded to Mt. Wolf.[2] At best, defendant has found an error which goes to credibility. No reference to the apparent error appears upon re-examination of the record. However, numerous references do arise in the record regarding Mrs. Grove's testimony that the April 23rd notice was re-mailed to Mt. Wolf (see, e.g. Transcript, at 55).

[2] Defendant argues that the April 2 reference was to the mailing of a draft re-classification, not an induction notice.

As Mrs. Grove noted, "I have personal knowledge of the entire file" (Transcript, at 14). The court therefore has her testimony of personal knowledge combined with statements (uncontroverted at trial) that the induction notice was sent to Mt. Wolf. From that and other evidence, this court concluded that the defendant had indeed received the induction notice.

In any event, defendant is pointing only to an area of discretion vested in the fact finder. Nothing regarding the post trial motion in any way alters the court's conclusions as set down in its July 19, 1972 memorandum.

Therefore, assuming *arguendo* the timeliness of the motions involved, they are denied. For reasons cited herein, the request to vacate the court's order is denied.

R. Dixon Herman
United States District Judge
Middle District of Pennsylvania

Dated: August 17th, 1972.

Judgment of the Court of Appeals Affirming Petitioner's Conviction

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 72-1994

UNITED STATES OF AMERICA

—v.—

THOMAS LEE LIVINGSTON,

Appellant.

(Middle District of Penna.—Criminal No. 14685)

Submitted Under Third Circuit Rule 12(6) March 20, 1973

Before SEITZ, *Chief Judge,*
ALDISERT and ADAMS, *Circuit Judges.*

JUDGMENT ORDER

After considering defendant's contentions that: (1) there was insufficient evidence to prove that he willfully failed to report for induction because the Government failed to prove defendant actually received an induction notice; (2) the failure to provide a Form 150 for claiming Conscientious Objector status after a request in writing violated both Selective Service law and defendant's right to Fifth Amendment Due Process; (3) deviation from the

order of call invalidates his subsequent induction order; (4) summary disposition of his file along with those of 524 other registrants in four and one-half hours denied defendant due process; and (5) the district court erroneously refused to consider defendant's posttrial motions, and finding such contentions without merit, it is

ORDERED AND ADJUDGED that the judgment of the district court is affirmed.

Dated: March 21, 1973

Order of the Court of Appeals Denying Petitioner a Rehearing en Banc

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 72-1994

UNITED STATES OF AMERICA

—v.—

THOMAS LEE LIVINGSTON,

Appellant.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,*
VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, and WEIS, *Circuit Judges.*

The petition for rehearing filed by Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

SEITZ
Chief Judge

Dated: April 16, 1973.

Local Board's Minutes of Action

Dates	Minutes of Actions by Local Board and Appeal Board and on Appeal to the President
2/13/64	SSS-109 from Penna State Univ.
Mar 12 1964	Classified Class 2-S until Oct 1964
Mar 12 1964	SSS-110 mailed reg.
4/29/64	SSS-109 from Penn State
Oct 20 1964	Classified Class—2S Oct 1965
Oct 20 1964	SSS Form 110 mailed
Nov 10 1965	SSSP-2617 (Rev.) mailed
11/22/65	SSSP-2617 received—single—labor
Dec 7 1965	Classified Class—1-A
Dec 7 1965	SSS Form 110 mailed
Dec 23 1965	SSS Form 223 mailed
4/ 8/66	DD-62 mailed—found acceptable for induction
Apr 19 1966	SSS 252 mailed 5/9/66—Letter filed by Vista
5/10/66	Failed to report for induction
5/17/66	File reviewed by local board—not in favor of reopening class.
7/ 1/66	Notified registrant the board is not in favor of reopening classification.
7/19/66	Letter on file from registrant—copy of letter fwd'd Gen. Gross.
8/16/66	File returned to local board. Reported to the U.S. Attorney
9/19/66	Letter from registrant on file. Requested Form 150

Dates	Minutes of Actions by Local Board and Appeal Board and on Appeal to the President
9/20/66	Conversation sheet on file—FBI Agent, Mr. Harry. Advised us not to give him the form.
9/28/66	Complete file forwarded State Headquarters at request of Col. Halfpenny.
1/11/67	File returned—recommend deferment.
JAN 17 1967	Classified Class 2-A until 1/17/68 ONLY (for VISTA)
JAN 17 1967	SSS-110 mailed
1-17-68	SSS-127 mailed
3/14/68	Classified Class—1A
MAR 19 1968	SSS Form 110 mailed
APR 23 1968	SSS 252 mailed
5-16-68	FAILED TO REPORT FOR INDUCTION.
6- 6-68	Reported to US Dist Attorney—SSS Form 301.
7-31-68	Duplicate SSS-127 mailed, also letter returned for signature.
8- 5-68	SSS-127 completed and letter signed requesting duplicate cards. Employed by present employer since 6-67 (Self employed as a Photographer)
8-23-68	Mail returned from 4441 N. Clifton Avenue, Chicago, Ill. (address unknown)
3- 7-69	File returned from state headquarters
9-11-69	Complete file and cover sheet mailed to LTC Silverberg as per telephone conversation

1-A

44-64
Feb

J.D. Thompson
869 Ceylon St.
Mt. Wolf, PA.
May 17, 1964

Local 130, No. 173
3rd Fl. Sherrill Bldg.
9W. Philadelphia St.
York, PA.

3rd Fl. ...
MAY 19 1960
W. PHILADELPHIA ST.
YORK, PA. 17403

Gentlemen:

It has been brought to my attention that you have not sufficient enough information concerning my Request for an occupational deferment at this time.

As a result, I have Requested Vista, Washington to send you more information.

If would be my suggestion, that you send a letter to Vista, Washington 25, D.C. and GIVE them a detailed Account of the information Required By you for deferment.

Respectfully,

Thomas D. Thompson

29 December 1966

k:31:12-29

Honorable Bernard J. Brown
United States Attorney
Middle District of Pennsylvania
U. S. Court House
Scranton, Pennsylvania 18501

Attention: Julius Altman
Assistant United States Attorney

Subject: LIVINGSTON, Thomas Lee
SS No. 36-173-44-64

Dear Sir:

This concerns the subject registrant who was reported to your office under date of 15 August 1966.

After considering your letter that the registrant be reordered for induction, and particularly in view of the time which has elapsed, we feel it would be better to withdraw the case from prosecution at this time and to return it to the local board with the request that he be considered for reclassification into Class II-A to May 1967, which would permit him to complete his year in VISTA under the Office of Economic Opportunity.

May we have your comments on this.

For the State Director:

HUGH C. SHODGRASS
Lt. Colonel, CE
Manpower Division

LOCAL BOARD NO. 173
3rd [illegible] BLDG.

JAN 11 1967

[illegible]
YORK, PENNA

DJB:JA:am

United States Department of Justice

UNITED STATES ATTORNEY
MIDDLE DISTRICT OF PENNSYLVANIA

Scranton, Penna. 18501
January 4, 1967

Hugh C. Snodgrass, Lt. Colonel, CE
Manpower Division
Selective Service System
P.O. Box 1921
Harrisburg, Pennsylvania 17105

Re: Thomas Lee Livingston
SS No. 36-173-44-64

Dear Col. Snodgrass:

In reply to your letter of December 29, 1966, I quite agree with the action you contemplate taking with regard to above registrant.

The only bit of advice I would like to give you at this time would be to make certain at the expiration of this registrant's year in VISTA, that he then immediately be ordered in for induction, and upon his failure to report, prosecution be instituted to enforce said induction.

Thank you for your cooperation in this matter.

Very truly yours,

BERNARD J. BROWN
United States Attorney

JULIUS ALTMAN
Assistant U.S. Attorney

... NO. 4... SHERRILL BLDG.
APR 6 1967
... W. PHILA...

3- 4- 67
Chicago, Ill.
Sel. Ser. No.
36-173-44-64

Local B d. # 173
3rd Floor Sherrill Bldg.
9 W. Philadelphia st.
York, Pennsylvania

Gentlemen;

This is to inform you that I have been transfered from Oregon, to Chicago, Illinois; as a VISTA Volunteer.

This does not result in a change of occupation; only in a change of location and in the people with whom I will be working.

My address will be - 3700 W. Grand Ave. Chicago, Illinois.

Respectfully,

T.L.Livingston

4/2/68 Remailed to Registrant
at 809 Center Street,
Mt. Wolf, Pa., 17347.

DAC

POSTAGE AND FEES PAID
SELECTIVE SERVICE SYSTEM

SELECTIVE SERVICE

OFFICIAL BUSINESS

Thomas Lee Livingston
3700 S. Grand Ave.
Chicago, Ill 60600

MAR 25 1968

SELECTIVE SERVICE SYSTEM

ORDER TO REPORT FOR INDUCTION

LOCAL BOARD NO. 173
3rd FL. SHERRILL BLDG.
9 W. PHILADELPHIA ST.
YORK, PENNSYLVANIA 17403
(Local Board Number)

The President of the United States,

To

Thomas Lee Livingston
3700 W.Grand Avenue
Chicago, Ill 60600

23 April 1968
(Date of Mailing)

SELECTIVE SERVICE NO.
36 173 44 04

GREETING:

You are hereby ordered for induction into the Armed Forces of the United States, and to report

at NATIONAL GUARD ARMORY 330 NORTH GEORGE STREET, YORK, PA. 17403
(Place of reporting)

on May 16, 1968 (Date) at 6:45 A.M.- Daylight Savings Time (Hour)

for forwarding to an Armed Forces Induction Station.

EXECUTIVE SECRETARY (Clerk of Local Board)

IMPORTANT NOTICE
(Read Each Paragraph Carefully)

IF YOU HAVE HAD PREVIOUS MILITARY SERVICE, OR ARE NOW A MEMBER OF THE NATIONAL GUARD OR A RESERVE COMPONENT OF THE ARMED FORCES, BRING EVIDENCE WITH YOU. IF YOU WEAR GLASSES, BRING THEM. IF MARRIED, BRING PROOF OF YOUR MARRIAGE. IF YOU HAVE ANY PHYSICAL OR MENTAL CONDITION WHICH, IN YOUR OPINION, MAY DISQUALIFY YOU FOR SERVICE IN THE ARMED FORCES, BRING A PHYSICIAN'S CERTIFICATE DESCRIBING THAT CONDITION, IF NOT ALREADY FURNISHED TO YOUR LOCAL BOARD.

Valid documents are required to substantiate dependency claims in order to receive basic allowance for quarters. Be sure to take the following with you when reporting to the induction station. The documents will be returned to you. (a) FOR LAWFUL WIFE OR LEGITIMATE CHILD UNDER 21 YEARS OF AGE—original, certified copy or photostat of a certified copy of marriage certificate, child's birth certificate, or a public or church record of marriage issued over the signature and seal of the custodian of the church or public records; (b) FOR LEGALLY ADOPTED CHILD—certified court order of adoption; (c) FOR CHILD OF DIVORCED SERVICE MEMBER (Child in custody of person other than claimant)—(1) Certified or photostatic copies of receipts from custodian of child evidencing serviceman's contributions for support, and (2) Divorce decree, court support order or separation order; (d) FOR DEPENDENT PARENT—affidavits establishing that dependency.

Bring your Social Security Account Number Card. If you do not have one, apply at nearest Social Security Administration Office. If you have life insurance, bring a record of the insurance company's address and your policy number. Bring enough clean clothes for 3 days. Bring enough money to last 1 month for personal purchases.

This Local Board will furnish transportation, and meals and lodging when necessary, from the place of reporting to the induction station where you will be examined. If found qualified, you will be inducted into the Armed Forces. If found not qualified, return transportation and meals and lodging when necessary, will be furnished to the place of reporting.

You may be found not qualified for induction. Keep this in mind in arranging your affairs, to prevent any undue hardship if you are not inducted. If employed, inform your employer of this possibility. Your employer can then be prepared to continue your employment if you are not inducted. To protect your right to return to your job if you are not inducted, you must report for work as soon as possible after the completion of your induction examination. You may jeopardize your reemployment rights if you do not report for work at the beginning of your next regularly scheduled working period after you have returned to your place of employment.

Willful failure to report at the place and hour of the day named in this Order subjects the violator to fine and imprisonment. Bring this Order with you when you report.

If you are so far from your own local board that reporting in compliance with this Order will be a serious hardship, go immediately to any local board and make written request for transfer of your delivery for induction, taking this Order with you.

SSS Form 252 (Revised 6-25-48) (Previous editions may be used until exhausted.)

Ave ad

T.L. Livingston
809 Center Street
Mt. Wolf, Penna.

LOCAL BOARD NO. 173
3rd FL. SHERRILL BLDG.
JUL 31 1968
U.S. PHILADELPHIA 2
PENNA.

Local Board No. 173
Sherill Bldg.
York, Pa.

Gentelmen,

I have been lifted of my wallet, in which was all my identification. Would appreciate it to the utmost if you all could send me duplicate copies of my cards.

I'm sending you this letter from Chicago, as I am working here for six weeks, if you send them to me within the next three weeks, please send them to

Thomas Livingston
4491 n. Clifton Ave.
Chicago, Illinois 60640

If it takes any longer, send them to my home address which is above. I would appreciate any quick action taken on your part as an identification is needed to walk the streets in this city and I was asked yesterday to show i.d. to two policemen and it took some explaining to them before they left me go. -- please hurry.

Respectfully, THOMAS
tl livingston

31 July 1968

RE: SSS No. 55-273-41-6
DELINQUENT

Thomas Lee Livingston
4431 N. Clifton Avenue
Chicago, Ill. 60613

Dear Mr. Livingston:

We are returning your letter, herewith, requesting duplicate cards which needs your signature.

As you know, you failed to report for induction, as ordered 10 May 1966. The local board reported you to the United States Attorney 6 June 1968.

You also failed to complete and return SSS Form 127, Current Information Questionnaire, mailed 17 January 1968. A duplicate of this form is attached for you to complete and return with your letter requesting duplicate cards.

FOR THE LOCAL BOARD

Executive Secretary

encl - SSS-127 and
Registrant's letter

CURRENT INFORMATION CONCERNING REGISTRANT

LOCAL BOARD NO. 173
3RD FL. SHERRILL BLDG.
9 W. PHILADELPHIA ST.
YORK, PENNA. 17403
(Local Board Stamp)

LOCAL BOARD NO. 30a
POST OFFICE ADDRESS
JUL 31 1963
W. PHILADELPHIA
(Street)

TO:

Thomas Lee Livingston
4431 N. Clifton Ave.
Chicago, Ill 60600

Selective Service No.	Date of birth	Class
36 373 4h 6h	Feb. 6 (Month) (Day) (Year)	1-A Del.

Date of Mailing 7-31-63

COMPLETE AND RETURN PROMPTLY AT ONCE

(The above items, except the date questionnaire returned, are to be filled in by the local board clerk before questionnaire is mailed)

The law requires you to fill out and return this questionnaire on or before the date shown to the right above in order that your local board will have current information to enable it to classify you. When a question or statement in any series does not apply, enter "DOES NOT APPLY," or "NONE"; otherwise complete all series. You may attach any additional information you believe should be brought to the attention of the local board. After completing the statements be sure to date the form and sign your name. FILL OUT WITH TYPEWRITER, OR PRINT IN INK.

Executive Secretary, M. Catherine Shaw
(Title) (Signature of Local Board)

STATEMENTS OF THE REGISTRANT
CONFIDENTIAL AS PRESCRIBED BY THE SELECTIVE SERVICE REGULATIONS

SERIES I.—MAILING ADDRESS

1. Name(s) and address(es) of person(s) other than a member of your household who will always know your address [illegible]

2. My current mailing address is 629 South St Mt. Holly, Pa.

3. My telephone number (home or business) is 866-1978 (ZIP code)

SERIES II.—MARITAL STATUS AND DEPENDENTS

1. (a) I (Check one) ☑ HAVE NEVER BEEN MARRIED ☐ AM A WIDOWER
☐ AM MARRIED ☐ AM DIVORCED

(b) I (Check one) ☐ DO ☐ DO NOT live with my wife; if not, her address is [illegible]

(c) We were married at [illegible] on [illegible] (Date)

2. (a) I have the following children under 18 years of age who live with me in my home:
Name None Age ____ Name None Age ____
Name None Age ____ Name None Age ____

(b) If you have no child other than an unborn child, attach a statement from a physician showing the basis for his diagnosis of pregnancy and the expected date of birth.

3. I (Check one) ☐ DO ☐ DO NOT have dependents other than those listed above.

SERIES III.—MILITARY RECORD

1. If you are now on or have been separated from active military service enter (a) Armed Force ____
(b) Service number 2[illegible] (c) Date of entry ____
(d) Date of separation [illegible] (e) Type of separation ____

2. If you are now a member of a reserve component (including the National Guard) give (a) Name and address of unit ____
(b) Service number ____ (c) Date of enlistment, transfer, or appointment ____

3. If you are now a member of a Reserve Officer Training Corps or any other officer procurement program describe fully ____

SSS FORM 127 (Revised 9-15-61)
(Previous printings may be used)

(CONTINUED ON REVERSE SIDE)

SELECTIVE SERVICE

OFFICIAL BUSINESS

IF NOT DELIVERED IN 5 DAYS
RETURN TO

36a

LCL 3VC L B 173
SHERRILL BLDG.
9 N PHILA. ST.
YORK, PA. 17402

STAMP OF BOARD OR ADDRESS OF SENDER

3d FIRST CLASS MAIL

POSTAGE AND FEES PAID
SELECTIVE SERVICE SYSTEM

Addressee unknown

AUG 23 1969

REASON CHECKED
Unclaimed
Unknown
Insufficient address
Moved, Left no address
No such post office in state
No mail received at this

RETURNED TO SENDER

Thomas Lee Livingston
4444 North Clifton Ave.
Chicago, Illinois 60640

37a

DELINQUENT REGISTRANT REPORT

LOCAL BOARD NO. 173
3rd FL. SHERRILL BLDG.
9 W. PHILADELPHIA ST.
YORK, PENNSYLVANIA 17403
(Local Board Stamp)

JUN 6 1968
(Date)

TO: Hon. BERNARD J. BRYN, United States Attorney.
Middle District of Pennsylvania, U. S. Court House, Scranton 3, Penna.
(Address)

1. IDENTIFICATION OF DELINQUENT:

Full name of delinquent:				
LIVINGSTON (Last)	Thomas (First)	Lee (Middle)		(Alias, if any)
Last known address: 3700 W. Grand Ave., Chicago, Ill (Number and street or R. F. D. route) (City, town, or village)		60600 (County) (State) (Zip Code)	Last known telephone No.:	
Selective Service No.: 36 373 44 64	Social Security No.: 203 34 3044		Selective Service classification: Class 1-A	
Color of eyes: Blue	Color of hair: L. Brown	Height: 5' 6 3/4"	Weight: 135	Other obvious physical characteristics:
Date of birth: February 6 1944 (Month) (Day) (Year)		Place of birth: York (City, town, county)	Pennsylvania (State or country)	
Prior military service: none (Armed Force) (Service number) (Date of entry)				
(Name of last organization)		(Date of separation)		
This delinquent has a court record as follows:				
Offense	Date of Conviction (Month, day, year)	Court (Name and location)	Sentence	

2. OFFENSES:

This delinquent (check applicable box) ☒ failed to report for induction ☐ reported for induction but failed or refused to submit to induction into the Armed Forces pursuant to (check applicable box):

☒ Order to Report for Induction (SSS Form 252).
☐ Order for Transferred Man to Report for Induction (SSS Form 253).

The order indicated was mailed on 23 April 1968 (Date of mailing) to this delinquent at 3700 W. Grand Ave., Chicago, Ill. 60600 (Address) to report on 16 May 1968 (Date).

In addition to failing to report for induction into the Armed Forces this delinquent has also failed to perform the following duties at the times indicated:

DUTIES	DATES

SSS Form 301 (Revised 10-8-64) (OVER)

3. EFFORTS MADE TO LOCATE DELINQUENT:

The delinquent _____ been located on _____ at _____.
(Has, has not) (Date) (Address)

The person who will always know the delinquent's address is _____
(Name)

_____ (Address) This person _____ (Has, has not) been contacted by

_____ (Letter, telephone, in person) on _____ (Date) with the following result _____

_____

The delinquent's last known place of employment or business is _____
(Name)

_____ (Address), _____ (Telephone number) His employer _____ (Has, has not) been contacted by

_____ (Letter, telephone, in person) on _____ (Date) with the following result _____

_____

4. Mail directed to the delinquent _____ (Has, has not) returned by the post office.
18

5. REMARKS: (Include additional efforts to locate delinquent or names of individuals who may know whereabouts of the delinquent.)

April 2, 1968 - Induction Notice, SSS Form 252 was remailed to original address: 809 Center Street, Mt. Wolf, Pa. 17347

Mail was NOT returned by the post office.

6. FUTURE INFORMATION:

You will be advised promptly by letter of any change in this delinquent's status and of any additional facts which may come to the attention of this board concerning his whereabouts or which may aid you in apprehending and prosecuting him.

M. Catherine Grove
(Name of executive secretary of local board)
EXECUTIVE SECRETARY

This form shall be used to report to the United States Attorney those delinquents who fail to report for induction or who fail or refuse to submit to induction. Other delinquencies, if reported to the United States Attorney, shall be reported by letter.

This form shall be made out in quadruplicate. The original and two copies are forwarded to the State Director of Selective Service who shall transmit the original and one copy to the United States Attorney for the judicial district in which the local board is located. One copy of the form shall be filed in the Cover Sheet (SSS Form 101) of the delinquent.

OPO 80

Extracts From Testimony

• • • • •

—42a—

Q. Now, in that letter you indicate, "As you know," —this is a letter to Mr. Livingston—"you failed to report for induction, as ordered on May 10, 1966."

Now, hadn't the defendant an order to report for induction again after 1966? A. Yes. He was ordered to report April 23, 1968.

Q. Did he ever get that letter that you know of, the order to report for induction in April 1968? A. April 1968?

Q. Yes. A. We have a copy in the file.

Q. Where was the original sent to? A. 3700 West Grand Avenue, Chicago, Illinois.

Q. Now, you had attempted to mail something under the post date of March 22, 1968, isn't that correct? A. Yes.

Q. And that came back as "addressee not here, address not known," is that correct? A. That is correct.

By the Court:

Q. Is that the letter sent to Chicago, you say? A. Yes sir, but that was re-mailed to the registrant at 809 Center Street, Mount Wolf, Pennsylvania.

By Mr. Axelrod:

Q. Have you ever been informed by the registrant–

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after March 22, 1968, had you ever been informed by the registrant to direct his mail to that address? A. Not by

the registrant, but it is our policy to try to locate the registrant.

Q. Had you ever been notified by the registrant after March 22, 1968 that that was his new address? A. No.

Q. Can you tell me why, on July 31, 1968, you didn't tell the registrant he had been ordered to report for induction in 1968, referring to the letter you signed July 31, 1968? A. I don't understand the question.

Q. Would you put the letter in front of you? A. July c 1968?

Q. July 31, 1968. A. Yes sir.

Q. Now, there you state, "As you know, you failed to report for induction as ordered on 10 May 1966."

Why didn't you tell him he had been ordered to report in 1968? A. I can't answer that.

Q. Didn't you have a suspicion maybe he didn't get the mail since the envelope had come back "address unknown"? A. I can't answer that.

Q. After a man fails to report for induction do you ever send him additional orders to give him another chance

—44a—

to submit. A. We give him another chance sometimes, yes.

Q. You received correspondence from him on July 31, 1968; is that correct? A. July 31, 1968.

Q. Does that letter from him indicate he knew he was supposed to report for induction? Is there anything there that would let him infer that?

The Court: You say this is a letter from him the same date her letter went out to him in Chicago?

Mr. Axelrod: This is a letter received at the local board July 31, 1968.

By Mr. Axelrod:

Q. Is there anything indicating that he was aware he was supposed to report in 1968? A. No, he sent the letter —shall I read it?

The Court: Yes, read it.

The Witness: "Gentlemen:

"I have been lifted of my wallet, in which was all my identification. Would appreciate it to the utmost if you all could send me duplicate copies of my cards. I am sending you this letter from Chicago, as I am working here for six weeks. If you send them to me within the next three weeks, please send them to Thomas Livingston, 4431 North Clifton Avenue, Chicago, Illinois."

—45a—

By the Court:

Q. Was it as a result of receiving that letter that you wrote the letter the same day, July 31, or did your letter go before? What did you say to him in your letter of July 31 to him? A. I said: "We are returning your letter herewith requesting duplicate cards which needs your signature." It was not signed and we require signature.

Q. Is that the one where you say: "As you know, you were ordered to report for induction"? A. "As you know, you failed to report for induction."

Q. What else did you say? A. That I wrote?

Q. Yes, that you wrote. A. "As you know, you failed to report for induction, as ordered 10 May 1966. The local board reported you to the United States Attorney 6 June 1968. You also failed to complete and return SSS Form 127, Current Information Questionnaire, mailed 17 January 1968. A duplicate of this form is attached for you

to complete and return with your letter requesting duplicate cards." We enclosed the letter returned with the Form 127.

By Mr. Axelrod:

Q. Was that form sent back to the local board? A. Yes sir.

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Q. It was? A. Yes sir.

Q. You testified, I believe, that in 1966, after he refused induction, he requested a Form 150 but at that point it was out of the jurisdiction of the board, is that correct? A. Yes.

Q. Well, why wasn't the case, he having refused induction in April of 1968, why wasn't the case also out of your jurisdiction at that point after refusal? A. Because upon advice of the United States Attorney we were asked to reclassify him or consider him for a 2-A to complete his VISTA. So that reopened his case. That reopened his case.

Q. But in 1968, July 31, this was how long after he was supposed to have reported for induction? A. I don't understand.

By the Court:

Q. He was ordered to report April 23, 1968, wasn't he? A. That is right.

Q. He was to be there May 16, 1968. The question is that in July 1968 you still had the file? A. Yes.

Q. The other time when he failed to report, the file, you say, was out of your hands and sent to the U. S. Attorney. Here in May he failed to report and a month or so went

—47a—

by and you still had the file. That is the question. A. Yes.

Q. When do you send it when a person fails to report for induction? Is there any rule as to how long you keep it before you send it to the U. S. Attorney, or does this vary with the different cases? A. Well, usually after he fails to report for induction, then we prepare the file and send it to State Headquarters.

Q. Here is a case where he failed to report in May, but you hadn't sent it yet in July, is that right? A. No. The case was sent up before that. It was sent up in May.

Q. It was sent up in May? A. Yes.

Q. But you did answer his letter when you got it in July? A. Yes.

By Mr. Axelrod:

Q. But you didn't answer his letter in 1966 when he requested a 150, is that correct? A. Because it was under the jurisdiction of the court. Well, it was out of our hands. It was out of our hands.

Q. Now, Mrs. Grove, what kinds of considerations go into the decision as to whether or not you send out an addi-

tional order to report for induction after a man has failed to report? You say you do it sometimes? A. Well, we make every effort to contact his previous employer or his parents, and sometimes they give us a lead and we give them another chance.

Q. In other words, sometimes you do your own investigation? A. No, we—

Q. Do you do your own investigation by contacting his employer? A. Yes sir.

Q. Here is a man who on July 31 indicated he had lost his cards and gave you a new address, then completed a new questionnaire and returned it to the local board with

a new address. Did you make an effort to give him another order to report for induction? A. I didn't follow you.

Q. What effort did you make to give him another order to report for induction, to give him another chance after he had failed to report? A. Well, it seemed as though he was getting his mail.

Q. My question is: What efforts did you make to give him another chance after he failed to report? A. We mailed his notice on April 2, 1968 and the mail was not returned by the post office from 809 Center Street, Mount

—49a—

Wolf. We assumed he received his notice.

Q. You made no effort after he contacted you; is that correct? After he told you he lost his draft cards and gave you a new address, did you make any effort to give him another chance? A. No. We assumed he received his mail. It was not returned.

Q. After he sent in the new current information questionnaire, again giving his address, did you make any effort to give him another chance by sending him another notice of induction? A. Well, we did send it out again.

Q. After July 1968? A. Not after July, no.

Q. After he sent in that new current information questionnaire, you made no effort, is that correct? A. That is correct.

Q. As a matter of fact, from your letter of July 31, he had no way of knowing he was supposed to have been inducted in 1968, did he? He was told he had refused in 1966? A. Well, he refused his mail. Someone refused his mail.

Q. The letter of July 31, 1968, did that indicate to the reader of that letter that he knew he was supposed to have

reported in 1968? You can look at the letter and refresh

—50a—

your memory, if you would like to. A. Which letter?

Q. July 31, 1968, a letter written by you. A. Yes.

Q. Does that tell him anywhere he was supposed to report in 1968? A. No, that letter does not say that.

Q. Actually, that letter would tend to mislead him, wouldn't it, saying he failed to report in 1966?

Mr. Walker: We would object to that, Your Honor. It is a conclusion.

The Court: Overruled.

By Mr. Axelrod:

Q. You can answer that. A. What was the question?

Q. Wouldn't that letter tend to mislead him into thinking he had never been ordered to report for induction in 1968, by pointing out that he had refused in 1966? A. I don't know. I really don't know. I really don't know.

Mr. Axelrod: Your Honor, if I may go back to the minutes of that meeting—

The Court: Do you have a copy now?

Mr. Axelrod: Yes. If the Court will indulge me for a moment so I can look these over—I have never seen

• • • • •

—54a—

Q. Now, Mrs. Grove, I believe you testified that when Thomas Lee Livingston first registered his address was what? A. 809 Center Street, Mount Wolf, York County.

Q. And that was an address that was supplied to the board by whom? A. By the registrant.

Q. Where normally then would all mail be sent to this particular registrant? A. 809 Center Street, Mount Wolf.

Q. And whose responsibility is it to inform the board of any changes in address? A. It is the registrant's responsibility. We must have his signature.

• • • • •

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Q. I refer you to G-1, a letter dated 13 May 1966 from the local board to the registrant. Do you have a copy of that there? A. 13 May?

Q. 1966. From the local board to the registrant. A. Yes.

Q. And where was that sent to? A. 809 Center Street, Mount Wolf.

Q. Is that the original or a copy of the letter you have? A. I have the original and the copy.

Q. Why do you have the original? Was it sent back to the board? A. It was sent back with the notation on the bottom.

Q. Would you read that notation, please? A. "The above letter came to our home, and we are at a loss in knowing what to do about it. It was our understanding that you were aware Tom was in VISTA as of May 1st. Please take this up with them.

"Sincerely, Mr. and Mrs. Daniel Livingston."

Q. Do they give you an address for Mr. Livingston? A. The address of Vista, Incorporated is below.

Q. Would you read to His Honor the rest of the letter where it says: "Address of Vista is below." A. "Mr. T. L. Livingston, care of Marjorie D. Kelly, Training Director,

—60a—

VISTA.

Q. Now, did you ever make a notation on the front of the file of that change of address? A. No, we didn't.

Q. Are you required to make entries on the front of the file on a change of address? A. It had never been the policy, unless the registrant requests it with his signature.

Q. But in 1968, you had at least one letter in the file indicating that he was not available at 809 Center Street, is that correct? A. I just read the letter.

Q. Now, you testified that the board took some action on May 17, 1966, is that correct? A. On May the—what are you referring to? I don't understand.

Q. Your testimony. Did you testify you refused to reopen his classification on May 17, 1966? A. That is correct.

Q. That is correct? A. Yes.

Q. Now, do you have the minutes of that meeting with you? A. April 17—May 17?

—64a—

Q. 1966. A. Oh, yes.

Q. Would you say it is more than two years? A. Yes.

Q. More than three years? A. At least three years, if not more.

Q. You made reference before to a regulation saying that a registrant must sign his name to effect a change of address, is that correct? Was that your testimony? A. Well, it is the policy of the local board.

Q. It is a policy of the local board? A. Yes.

Q. In other words, you are not sure there is a regulation to that effect? A. I wouldn't definitely say it is a regulation but it is a policy of the board.

Q. I show you a regulation found in what is called "Code of Regulations." Let me read you a portion of it. This is 16.13.12(b). It says: The registrar shall advise the registrant that a correct mailing address is most important

because it is the address to which all notices to the registrant shall be sent, and he must advise his local board each time there is a change in his mailing address.

Is that the policy or regulation you have reference to? A. Yes.

—66a—

The Witness: No, I don't.

Mr. Axelrod: No further questions of this witness.

The Court: You may step down.

(Witness excused.)

Mr. Axelrod: I call the defendant to the stand.

Thomas Lee Livingston, called as a witness, was duly sworn and testified as follows:

Direct Examination by Mr. Axelrod:

Q. Mr. Livingston, in 1968, did you ever receive a notice to report for induction? A. No, I didn't.

Q. Were you ever made aware you were to report for induction by anyone? A. No.

Q. You submitted an address in Chicago to your local board in 1967, is that correct? A. Yes sir.

Q. Were you living there in late April of 1968? A. Yes sir.

Q. Were you there at all times? A. Most of the time, yes. I was living there then.

Q. Did you customarily receive your mail there? A. Yes.

—68a—

• • • • •

Cross Examination by Mr. Walker:

Q. Mr. Livingston, where did you say you were living in Chicago in 1968? A. In 1968 I was uptown.

Q. Uptown? A. Uptown.

Q. Do you recall the address? A. On Clifton Avenue. It was the 4400 block. I don't know the exact number.

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SUPREME COURT, U. S.

No. 73-491

FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1973

THOMAS LEE LIVINGSTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-491

THOMAS LEE LIVINGSTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that there is insufficient evidence to support his conviction for wilful failure to report for induction.

After a jury-waived trial in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted of failure to report for induction into the Army, in violation of 50 U.S.C. App. 462. On the first appeal, the sentence was vacated and the case was remanded for findings of fact (Pet. App. 1a). The trial court filed an opinion including findings of fact and conclusions of law, again finding petitioner guilty (Pet. App. 9a). Imposition of sentence was suspended and petitioner was placed on probation for 26 months, upon condition that he perform civilian work in the national interest for two years. The court of appeals affirmed (Pet. App. 22a), and a motion for

rehearing was denied on April 16, 1973 (Pet. App. 24a). The petition for certiorari was filed on September 15, 1973, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court.[1] In any event, there is no reason to grant the writ.

The evidence shows that on April 23, 1968, an order to report for induction on May 16, 1968, was mailed to the latest address petitioner had given his local board, on Grand Avenue in Chicago (Pet. App. 32a). The letter was returned to the board by the post office and remailed to petitioner at his permanent address, on Center Street in Mount Wolf, Pennsylvania, where his parents resided (T. 40-41, 55).[2] That letter was not returned by the post office or by petitioner's parents, who had on a previous occasion returned a letter and given the board a new address for petitioner (App., *infra*). Petitioner testified that he was living at the Grand Avenue address in late April, 1968, but never received the order to report (Pet. App. 48a). The district court resolved this dispute in the evidence by find-

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[1] An application for an extension of time was received by the Clerk of the Court on June 13, 1973, but was returned to petitioner as untimely filed (Pet. 2).

[2] Petitioner is in error in stating that the uncontradicted evidence showed that the induction notice was not remailed to his permanent address (Pet. 5, 6, 10). The secretary of the board testified that she had personal knowledge of the file (T. 14) and that the order was remailed (T. 55). It is true that she testified that the notice was remailed on April 2, 1968 (T. 40-41)—an obviously mistaken date, since the order was not originally mailed until April 23, 1968. The mistake may have stemmed from a clerical error on the delinquency report in petitioner's file (Pet. App. 38a). This erroneous testimony was discussed in the memorandum and order denying petitioner's motion to vacate (Pet. App. 19a, 20a), where the trial court held that it related only to the credibility of the witness.

ing as a fact that petitioner received the order to report for induction (Pet. App. 17a, 21a).[3] Since petitioner offered no other justification for his failure to report for induction, the court found that his failure to report was wilful, and convicted him. The evidence, viewed in the light most favorable to the government, was sufficient to sustain the conviction.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1973.

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[3] This case does not, therefore, involve the question whether, if a registrant fails to keep the board apprised of his address, and an order for induction is mailed to a former address and never received by the registrant, the registrant may be convicted of failure to report for induction.

[4] Petitioner's reliance on *Gutknecht* v. *United States*, 396 U.S. 295 (Pet. 12, n. 6), for the proposition that he was ordered for induction out of turn is misplaced. In *Gutknecht*, the defendant was inducted because he exercised his First Amendment rights. In the instant case, petitioner would have been inducted in the normal course of events on May 10, 1966, if he had not joined VISTA (Pet. App. 11a). His order to report, made after he completed VISTA, was not a penalty for exercising rights but merely a completion of the course of events begun in 1966.

APPENDIX

SELECTIVE SERVICE SYSTEM

Local Board No. 173
3rd Fl. Sherrill Bldg.
9 W. Philadelphia St.
York, Penna. 17403
(local board stamp)

In reply, refer to:

13 May 1966

RE: SS No. 36-173-44-64

Thomas Lee Livingston
809 Center Street
Mt. Wolf, Penna. 17347

Dear Sir:

Kindly advise this local board, immediately, why you failed to report for induction on May 10th, 1966, as ordered.

FOR THE LOCAL BOARD

M. Catharine Grove, Clerk

Local Board No. 173
3rd Fl. Sherrill Bldg.

May 16 1966

9 W. Philadephia St.
York, Penna. 17403

Dear Sirs,

The above letter came to our home, and we are at a loss in knowing what to do about it. It was our

understanding that you were aware Tom was in Vista as of May 1st. Please take this up with them.

Sincerely,
Mr. & Mrs. Dan'l Livingston

Address of Vista, etc. is below

Mr. T. L. Livingston
c/o Marjorie D. Kelly
Training Director, Vista
N.C. Fund Inc.
Box 687 Durham, N.C.